

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH EDWARD BLACKBURN
Claimant

VS.

JAG CONSTRUCTION COMPANY
Respondent

AND

EMCASCO INSURANCE CO.
Insurance Carrier

Docket No. 1,061,954

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 10, 2012, preliminary hearing Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller. Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's application for temporary total disability benefits. The ALJ found claimant's act of working outside his medical restrictions was a refusal of the accommodated position provided to him by respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 10, 2012, Preliminary Hearing and the exhibits and the deposition of Ken Braley taken October 8, 2012, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the ALJ abused her discretion and was arbitrary and capricious in finding that claimant's violations of his work restrictions were equivalent to a refusal of accommodated work. Claimant asks the Board to reverse the ALJ's Order.

Respondent asserts the ALJ's decision was not arbitrary and capricious and was based on substantial evidence. Respondent contends claimant's violation of his restrictions while performing the accommodated work provided by respondent constituted a refusal of accommodated work under the Workers Compensation Act (Act) and the ALJ correctly denied claimant's application for temporary total disability benefits.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issues in this appeal from a preliminary hearing order?

(2) Did the ALJ exceed her jurisdiction in denying claimant's application for temporary total disability benefits? Was the ALJ's denial of temporary total disability benefits arbitrary and capricious?

FINDINGS OF FACT

Claimant works for respondent as a shop foreman. He is a mechanic and has one mechanic and two laborers under him. As part of his job, he has to lift heavy parts. On July 14, 2012, claimant was involved in a motor vehicle accident while on a work errand. Claimant was treated mainly for neck and chest pain. Claimant followed up on his own with a chiropractor, whom he saw two times before being told he had a \$500 limit to use for the chiropractor. Claimant testified the chiropractor took him off work on July 25, 2012, for a couple of days. Before that date, claimant had no restrictions.

Respondent directed claimant to see Dr. Matthew Henry for treatment. Claimant first saw Dr. Henry on July 27, 2012, and Dr. Henry gave him a restriction that he limit his lifting to 10 pounds. Claimant provided that restriction to respondent and was provided with light-duty work from that day on.

On August 20, 2012, claimant and another laborer were moving a compressor. The compressor was on a forklift. Claimant and the laborer were trying to shift the compressor so they could get it to the corner where it was going to be placed. The other laborer was trying to swing the compressor one way at the same time claimant was trying to swing it the other way. Claimant said he just reacted and did not even think about what he was doing. Claimant was not lifting the compressor; he was just holding it and pushing it to balance it. He was seen doing this by Ken Braley, who performs the human resources duties for respondent, including handling workers compensation claims. Claimant testified Mr. Braley asked him what he was doing but said nothing further to him until the next day.

The next day, August 21, 2012, Mr. Braley called claimant into his office. Mr. Braley was upset because he thought claimant was performing work exceeding his restrictions. Claimant was given a written warning and sent home. Mr. Braley told claimant he could come back to work when he had a full release from the doctor. Mr. Braley also told

claimant he would start receiving workers compensation benefits for lost wages. Claimant testified he never refused to do light-duty work and Mr. Braley had not reprimanded him about working outside his restrictions before August 21, 2012.

Mr. Braley testified claimant returned to work after the accident and was given light duty work on July 17, 2012. Mr. Braley said on July 20 and July 28, he noticed claimant performing work outside his 10-pound lifting restriction. He said he cautioned claimant both times about following his doctor's orders. On August 20, 2012, Mr. Braley observed claimant pulling on a 300-pound compressor, and he immediately told claimant to stop. As with the first two incidents, claimant appeared to have forgotten what he was doing and stopped when he realized he was exerting himself. Mr. Braley called claimant into his office and discussed the incident with him. Claimant did not deny he had been pulling on the compressor. Claimant told Mr. Braley he was just trying to slide the compressor around and acknowledged he probably should not have been doing it. Mr. Braley filled out a disciplinary report, which claimant refused to sign. Claimant was then sent home by respondent so claimant would not further injure himself. Claimant was told he could return to work when he had no restrictions. Mr. Braley told claimant he would be receiving workers compensation benefits while he was off work.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510c(b)(2)(B) states:

Where the employee remains employed with the employer against whom benefits are sought, an employee shall be entitled to temporary total disability benefits if the authorized treating physician imposed temporary restrictions as a result of the work injury which the employer cannot accommodate. A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2011 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2011 Supp. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary

total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.²

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

ANALYSIS

The compensability of claimant's accident is not in dispute. Respondent stipulated that the accident arose out of and in the course of claimant's employment. The only issue at the preliminary hearing was claimant's entitlement to temporary total disability compensation.

¹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

² See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁴ K.S.A. 2011 Supp. 44-555c(k).

The ALJ determined that claimant violated his work restrictions while working in an accommodated job with respondent. She further held claimant's actions constituted a refusal of accommodated work. Accordingly, temporary total disability compensation was denied. Claimant concedes that ordinarily a finding with regard to a claimant's entitlement to temporary total disability benefits is not subject to review by the Board on an appeal from a preliminary hearing order. However, claimant argues the Board has jurisdiction to review this finding on an appeal from a preliminary hearing order because the ALJ's ruling was arbitrary and capricious and violated claimant's right to due process of law. As such, claimant contends the ALJ exceeded her jurisdiction, giving the Board jurisdiction to review the ALJ's Order Denying Compensation.

The testimony of claimant is somewhat different than the testimony by respondent's representative, Mr. Braley, concerning the circumstances surrounding claimant's being reprimanded and sent home. In determining whether claimant was denied due process, the Board will not reweigh the evidence. Claimant was given an opportunity to be heard, so there is no basis for a claim of claimant being denied procedural due process.⁵ Instead, claimant argues, "Judge Fuller abused her discretion and was arbitrary and capricious in her finding that a violation of the restrictions is equivalent to a refusal of light duty work."⁶

Claimant's allegation that the ALJ's finding is arbitrary and capricious fails for two reasons. First, although it was disputed, there is a basis in fact for the ALJ's determination that claimant violated his work restrictions.⁷ Second, it was not unreasonable for the ALJ to equate a violation of restrictions with a refusal to perform accommodated work. Whether or not the ALJ erred in either regard does not give the Board jurisdiction to review the ALJ's decision.

CONCLUSION

The Board is without jurisdiction to review the ALJ's preliminary Order Denying Compensation.

⁵ See *Saffer v. Star Constr., Inc.*, No. 1,030,669, 2009 WL 3191382 (Kan. WCAB Sept. 30, 2009); and *Eubank v. State of Kansas*, No. 1,042,622, 2009 2480261 (Kan. WCAB July 15, 2009).

⁶ Claimant's Brief at 3 (filed Oct. 18, 2012).

⁷ See *Kaufman v. State Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal from the Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller dated October 10, 2012, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge